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IN THE COURT OF APPEALS OF INDIANA

JOSHUA L. OVERTON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 93A02-0806-EX-520
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT AND BRAD A. RENFRO,	)	
	)	
Appellees.	)	

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT
Steven F. Bier, Chairperson, George H. Baker, Member, Lawrence A. Dailey, Member
Cause No. 08-R-851

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant Joshua L. Overton appeals from the decision of the Review Board ("the Review Board") of the Department of Workforce Development ("the Department") that he was dismissed for cause by Appellee Brad A. Renfro, and is therefore ineligible to receive unemployment benefits. Overton contends that Renfro's appeal from the initial determination that Overton was not discharged for just cause was untimely. Moreover, Overton contends that he did not receive proper notice of a hearing conducted before a Department Administrative Law Judge ("ALJ"). Finally, Overton contends that Renfro lacked just cause to dismiss him. We affirm the Board's determination.

FACTS AND PROCEDURAL HISTORY

From November 3, 2004, until November 28, 2007, Overton worked for Renfro as a trim carpenter. Over the course of his employment with Renfro, he was "habitually late one to two times a week" and had been warned more than once that he would be discharged if his tardiness continued. Tr. p. 5. Overton failed to report for work on four straight days from November 23-26, 2007, and did not notify Renfro that he would not be coming in. On November 28, 2007, Renfro discharged Overton.

On December 6, 2007, a deputy from the Department determined that Overton had not been discharged for cause and was therefore eligible to receive unemployment insurance. Although the Determination of Eligibility was marked as mailed on December 19, 2007, Renfro did not receive it until January 17, 2008. Renfro mailed his appeal on January 25, 2008, which the ALJ from the Department later determined constituted a timely appeal.

On March 6, 2008, the Department mailed a "Notice of Hearing" to Overton, along with two documents entitled "General Instructions" and "U.I. Appeals Telephone Hearing Instructions." Exhibit Volume pp. 4-12. Overton, however, apparently did not receive an additional enclosure, to be returned to the ALJ, indicating whether he intended to participate in the telephonic hearing, not to participate in the hearing, or to withdraw his appeal. On the other hand, the "Telephone Hearing Instructions" provided, *inter alia*, that it was Overton's responsibility to provide the ALJ with a contact telephone number for purposes of the hearing and make certain that the ALJ received it, and that if the ALJ did not receive the contact number, it would be considered as a lack of response and unwillingness to participate in the hearing. Exhibit Volume p. 9.

On March 20, 2008, after a hearing in which Overton did not participate, the ALJ found that Overton's failure to appear for work as scheduled for four straight days "showed wanton and willful disrespect for the best interests of the Employer" and concluded that he was dismissed for "just cause." Appellant's App. pp. 10-11. Overton appealed the ALJ's decision to the Board, which, on May 14, 2008, affirmed the ALJ and incorporated its findings and conclusions.

DISCUSSION AND DECISION

Standard of Review

> The Indiana Unemployment Compensation Act provides that any decision of the review board shall be conclusive and binding as to all questions of fact. Ind. Code § 22-4-17-12(a). Review Board decisions may, however, be challenged as contrary to law, in which case the reviewing court examines the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of facts. Ind. Code § 22-4-17-12(f). Under this standard, we review determinations

> of specific or basic underlying facts, conclusions or inferences drawn from those facts, and legal conclusions. *McClain v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 693 N.E.2d 1314, 1317 (Ind. 1998).
>
> When reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings. *Abdirizak v. Review Bd. of Dept. of Workforce Development*, 826 N.E.2d 148, 150 (Ind. Ct. App. 2005). Our review of the Review Board's findings is subject to a "substantial evidence" standard of review. *Id*. In this analysis, we neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable to the Review Board's findings. *Id*. Further, we will reverse the decision only if there is no substantial evidence to support the Review Board's findings. *Id*.
>
> The Indiana Employment Security Act ("the Act"), Ind. Code § 22-4-17-1 *et seq.*, is given a liberal construction in favor of employees. *Id*. It merits such a construction because it is social legislation with underlying humanitarian purposes. *Id*. The Act provides that parties to a disputed claim for unemployment benefits are to be afforded a reasonable opportunity for a fair hearing. Ind. Code § 22-4-17-3.

Quakenbush v. Review Bd. of Ind. Dep't of Workforce Dev., 891 N.E.2d 1051, 1053 (Ind. Ct. App. 2008).

I. Timeliness of Renfro's Appeal from the Deputy's Determination

The Department deputy made its initial Determination of Eligibility on December 19, 2007, and the Determination was noted as being mailed to Renfro on that date. Renfro, however, did not actually receive the Determination before January 17, 2008, and filed his appeal on January 25, 2008. In light of these facts, the ALJ determined Renfro's appeal to be timely, a determination that the Board adopted. Overton, however, contends that the appeal was untimely, noting that it was not filed until over three weeks beyond the original deadline for doing so. Indiana Code section 22-4-17-2(b) (2007) provides, in part, that Renfro had "ten (10) days after … notice of benefit liability was mailed to the employer's last known address, or otherwise delivered to the employer" within which to

request a hearing before an ALJ. The General Assembly's use of the term "otherwise delivered" clearly contemplates that the employer actually receive the Determination for notice to be effective, not just that it be mailed. The ALJ's finding that the Determination was not initially delivered to Renfro was supported by the substantial evidence of his claim that he never received it. As such, the ten-day deadline imposed by Indiana Code section 22-4-17-2(b) was not triggered. We affirm the Board's conclusion that Renfro's appeal from the Determination was timely.

II. Overton's Notice of the ALJ's Hearing

Overton seems to argue that the results of the Board's determination should be overturned because he allegedly did not receive adequate notice of the ALJ's telephonic hearing. Specifically, Overton claims that he was not adequately notified of the ALJ's hearing because he did not receive a sheet, to be returned to the ALJ, indicating whether he desired to participate. Whether Overton received the enclosure in question, however, is irrelevant in light of his other actions indicating that he did not want to participate in the hearing. Overton admits that he received the "U.I. Appeals Telephone Hearing Instructions[,]" which clearly provided that he was to provide the ALJ with his telephone number before the hearing and that if he did not, it would be "considered as a lack of response and an unwillingness to participate in the hearing[.]" Ex. Vol. p. 11. Although the materials Overton received also provided that he could give his telephone number to the ALJ via telephone, fax, or mail and contained the ALJ's telephone number, fax number, and address, there is no indication that Overton made any attempt to provide this

information. In light of Overton's failure to provide contact information, whether or not he received the enclosure in question is of no moment.

III. Just Cause Determination

Indiana Code section 22-4-15-1(d)(3) (2007) provides that "'Discharge for just cause' as used in this section is defined to include but not be limited to … unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness[.]" Overton does not dispute that unexplained absences four days in a row following a warning about absence and tardiness would constitute just cause,[1] and we conclude that it does.

Here, Overton had been warned that if he continued his "pattern of absences and tardies" he would be discharged. Ex. Vol. 18. Despite the warning, Overton had unexcused absences on four consecutive days, regarding none of which he notified Renfro. "Warnings given to an employee prior to absence or tardiness have been held to justify the inference that the continued absence or tardiness was the result of the employee's wilful and wanton indifference to the best interests of the employer, thus constituting just cause for dismissal." *Cornell v. Review Bd. of Ind. Employment Sec. Div.*, 179 Ind. App. 17, 25, 383 N.E.2d 1102, 1107 (1979). We have noted that "warnings given to the employee prior to absence or tardiness resulting in discharge served to eliminate guesswork and justify the inference that continued absence or tardiness was the product of wilful or wanton indifference to the best interest of the

[1] Although Overton claims in his brief to have had excuses for these absences and to have notified Renfro in advance, there is nothing in the record to support these contentions.

employer." *Indus. Laundry v. Review Bd. of Ind. Employment Sec. Div.*, 147 Ind. App. 40, 43 258 N.E.2d 160, 163 (1970). Under the circumstances, we conclude that Overton's continued unexcused and unexplained absences, despite a prior warning about such practices, justified his termination for just cause.

The determination of the Board is affirmed.

RILEY, J., and BAILEY, J., concur.